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Lycurgan, Inc.

7 **UNITED STATES DISTRICT COURT**  
8 **SOUTHERN DISTRICT OF CALIFORNIA**

10 LYCURGAN, INC. d/b/a ARES  
11 ARMOR,

Plaintiff,

12 v.

13 B. TODD JONES, in his official  
capacity as Head of the San Diego  
14 Bureau of Alcohol, Tobacco,  
Firearms and Explosives; and  
15 DOES 1-10,

Defendants.

CASE NO. 14-CV-1679 JLS (BGS)

**DECLARATION OF SCOTT A.  
McMILLAN IN SUPPORT OF PLAINTIFF  
LYCURGAN, INC.'S OPPOSITION TO  
MOTION TO DISMISS**

Judge: Hon. Janis L. Sammartino  
Dept.: 4A  
Date: January 7, 2016  
Time: 1:30 p.m.

17 **DECLARATION OF SCOTT A. McMILLAN**

18 I, Scott A. McMillan, declare as follows:

19 1. I am counsel for Plaintiff Lycurgan, Inc. ("Lycurgan") in the above captioned  
20 case, and if called before this court or any other court I could and would testify  
21 competently to the following from my own personal knowledge, except as to those  
22 matters I state on information and belief, and as to those matters I believe them to be  
23 true.

24 2. This declaration is made in support of Lycurgan's Opposition to motion to  
25 dismiss.

26 3. Attached hereto as Exhibit A is a true copy of the November 18, 2015 Order of  
27 the Ninth Circuit Court of Appeals dismissing the appeal taken of this Court's earlier  
28 order dismissing the complaint in the present action.

1           4. I have read Mr. Armando Hernandez's "Declaration of Resident Agent in  
2 Charge Armando Hernandez" dated August 4, 2015.

3           5. As Mr. Hernandez reports, 18 units of the seized items were missing when  
4 ATF purported on December 23, 2014 to return the property it had seized.

5           6. Mr. Hernandez states at paragraph 4 to his declaration:

6           "4. On December 22, 2014, ATF retrieved all the EP80 firearms boxes  
7 from storage for transport to the ATF Carlsbad field office to facilitate the  
8 return of the seized property to Ares Armor. There was no indication that  
9 the storage facility had been breached or that any of the original boxes  
10 containing the seized firearms had been opened."

11           7. However, as Mr. Hernandez acknowledges, the property was returned on  
12 December 23, 2014, not December 22. On December 23, 2014, Mr. Hernandez, other  
13 ATF agents, Dimitrios Karras (the Chief Executive Officer of Lycurgan), and I were  
14 present at the ATF office when the boxes were returned. It was apparent to me then that  
15 some of the boxes had been tampered with, and that the tape sealing them had at some  
16 point been removed. I pointed this fact out to Mr. Hernandez. Neither he nor anyone  
17 else present disagreed with this observation at the time.

18           8. Because several of the boxes appeared to have been tampered with, I insisted  
19 that the contents be counted immediately, before the boxes were returned. This was  
20 done in my presence. The result of the count was that the boxes that appeared to have  
21 been tampered with contained fewer receivers than were indicated in the original  
22 inventory made at the time the receivers were seized.

23           9. To respond to the factual contentions on which ATF's motion to dismiss is  
24 based, it is necessary for Lycurgan to take written, documentary, and deposition  
25 discovery to determine the following:

26           a.       The chain of custody in the handling of the seized merchandise. Because  
27 items were seized pursuant to a search warrant, and purportedly to assist in  
28 a criminal investigation, the "chain of custody" of the items should have

been well documented. The chain of custody documentation should identify the manner in which the items were catalogued, from search and seizure to storage, to return. Presumably, the ATF has records for all of the times the goods were accessed.

- b. Other alleged miscounts of seized items, or failures to properly inventory items seized.
- c. Other claims of mishandled evidence.
- d. ATF's standard operating procedures for the custody of seized property and evidence.
- e. Whether the standard operating procedures relating to the custody of seized property and evidence were followed in this instance.
- f. Any specific directives with respect to the handling of Lycurgan's seized property.

I declare under the penalty of perjury according to the laws of the United States, that the foregoing is true and correct and that this declaration was signed on December 3, 2015, in the City of La Mesa, the County of San Diego, California.

/s/ Scott A. McMillan

Scott A. McMillan

# Exhibit ‘A’

FILED

UNITED STATES COURT OF APPEALS

NOV 18 2015

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

LYCURGAN, INC., a California  
Corporation, DBA Ares Armor,

Plaintiff - Appellant,

v.

TODD JONES, in his official official  
capacity as Director of the Bureau of  
Alcohol, Tobacco, and Firearms  
Enforcement,

Defendant - Appellee.

No. 15-55228

D.C. No. 3:14-cv-01679-JLS-BGS  
Southern District of California,  
San Diego

ORDER

Before: REINHARDT, W. FLETCHER, and N.R. SMITH, Circuit Judges.

We conclude that the December 17, 2014 order and “judgment” dismissing appellant’s claim without prejudice was not intended to be a final and appealable order. *See Montes v. United States*, 37 F.3d 1347, 1351 (9th Cir. 1994) (the “First Judgment” dismissing an action without prejudice “was not intended to be a final and appealable order” where the district court permitted plaintiff to file an amended complaint “*after* entering the First Judgment”) (emphasis in original).

Accordingly, we dismiss this appeal for lack of jurisdiction.

**DISMISSED.**

SL/MOATT